

**FILED**

JAN 21 2014

IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF OKLAHOMA

ROBERT D. DENNIS, CLERK  
U.S. DIST. COURT, WESTERN DIST. OF OKLA.  
BY Tuh DEPUTY

LAVERN BERRYHILL,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. CIV-13-1267-W

**ORDER**

On December 19, 2013, United States Magistrate Judge Suzanne Mitchell issued a Report and Recommendation in this matter and recommended that this matter be dismissed unless plaintiff Lavern Berryhill paid the filing fee in full by a designated date. Berryhill was advised of his right to object, see Doc. 5 at 4, but no objections have been filed within the allotted time.

Upon review, the Court finds in the absence of sufficient allegations in Berryhill's complaint that he "is under imminent danger of serious physical injury," 28 U.S.C. § 1915(g),<sup>1</sup> that Berryhill is prevented from proceeding in forma pauperis in this matter. E.g., Jennings v. Natrona County Detention Center Medical Facility, 175 F.3d 775, 778 (10<sup>th</sup> Cir.

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<sup>1</sup>Section 1915(g) is "the 'three strikes' provision of the in forma pauperis statute, as amended by the Prison Litigation Reform Act of 1995." Jennings v. Natrona County Detention Center Medical Facility, 175 F.3d 775, 778 (10<sup>th</sup> Cir. 1999). It provides in pertinent part:

In no event shall a prisoner bring a civil action . . . under this section if the prisoner has, on 3 or more prior occasions, while incarcerated . . . in any facility, brought an action . . . in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g). "This provision requires so-called 'frequent filer' prisoners to prepay the entire filing fee before federal courts may consider their civil actions . . . ." Jennings, 175 F.3d at 778 (quoting White v. Colorado, 157 F.3d 1226, 1232 (10<sup>th</sup> Cir. 1998)).

1999).

Accordingly, the Court

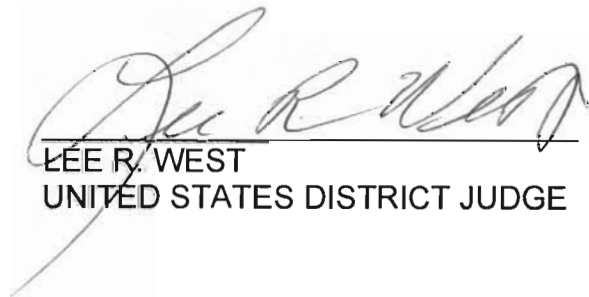
(1) CONCURS with Magistrate Judge Mitchell's findings with regard to Berryhill's Pauperis Affidavit, see Doc. 2, and to the extent that the Clerk of the Court has docketed this document as a motion seeking leave to proceed in forma pauperis, see Doc. 2, DENIES the same;

(2) ADOPTS the Report and Recommendation [Doc. 5] issued on December 19, 2013;

(3) ORDERS Berryhill to pay the filing fee of \$400.00 in full to the Clerk of the Court on or before February 10, 2014; and

(4) ADVISES Berryhill that if the filing fee is not paid in full by the designated date that this matter<sup>2</sup> will be dismissed without prejudice.

ENTERED this 21st day of January, 2014.



LEE R. WEST  
UNITED STATES DISTRICT JUDGE

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<sup>2</sup>Because the Court has considered only Berryhill's ability to proceed in forma pauperis under section 1915(g) at this stage of the proceedings, the Court has not determined, among other issues, whether Berryhill may proceed under title 42, section 1983 of the United States Code, which he has cited, against defendant United States of America. See West v. Atkins, 487 U.S. 42, 48 (1988)(section 1983 redresses deprivations of federal statutory or constitutional rights committed by person acting under color of state law); Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10<sup>th</sup> Cir. 2005)(Bivens action lies only against federal official in his/her individual capacity).